

EMPLOYMENT DISCRIMINATION IN THE LEGAL PROFESSION: A QUESTION OF ETHICS?

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In recent years, the ABA and local bar leaders have taken numerous steps to raise awareness about the need to increase diversity within the legal profession. In order to increase diversity, however, the legal profession must also seek to eliminate unlawful employment discrimination. In most workplaces, an employer's main concern with respect to discrimination is the possibility of a civil suit. In a surprising number of states, however, rules of professional conduct either explicitly prohibit employment discrimination on the part of lawyers or could be easily read to do so. Amending the rules of professional conduct in this manner is unlikely to have much of an impact when addressing employment discrimination and increasing diversity in the legal profession. These kinds of rules may, however, serve additional purposes that make their adoption worth considering.

TABLE OF CONTENTS

I.	INTRODUCTION	446
II.	EMPLOYMENT DISCRIMINATION IN THE LEGAL PROFESSION	449
	A. Structural Barriers to Equal Employment Opportunity	450
	B. New Issues for Employers	452
III.	ANTI-DISCRIMINATION AS A MATTER OF ETHICS.....	454
	A. Existing Rules	455
	1. Conduct Prejudicial to the Administration of Justice	455
	2. Discrimination in a Lawyer's Professional Capacity.....	456
	3. Harassment	457
	4. Discrimination in Violation of Law	458
	5. Employment Discrimination.....	459
	6. General Misconduct Rules	461

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IV. LIMITATIONS ON ADDRESSING EMPLOYMENT DISCRIMINATION THROUGH RULES OF PROFESSIONAL CONDUCT AND SUGGESTIONS FOR CHANGE	462
A. <i>Structural Limitations on the Ability of Ethics Rules to Address Employment Discrimination</i>	462
1. <i>Resources</i>	463
2. <i>Discrimination Lawsuits as a Condition Precedent Professional Discipline</i>	464
3. <i>The Clear and Convincing Standard</i>	465
4. <i>The Absence of a Rule Prohibiting Employment Retaliation</i>	466
5. <i>The Inability to Sanction Law Firms</i>	466
B. <i>Limitations on the Ability of Ethics Rules to Address Law Firm Discrimination</i>	467
C. <i>Do the Costs Outweigh the Benefits?</i>	471
V. A PROPOSED RULE	475
A. <i>The Need for a More Specific Rule</i>	476
B. <i>The United Kingdom Approach</i>	477
C. <i>A Proposed Rule</i>	480
1. <i>Furthering the Principles of Equality of Opportunity, Equal Access to the Courts and Its Institutions, and Diversity</i>	481
2. <i>Engaging in Employment Discrimination</i>	482
3. <i>Engaging in Harassment and Manifesting Bias and Prejudice</i>	483
4. <i>Failing to Make Reasonable Modifications</i>	483
5. <i>Retaliation</i>	484
6. <i>Special Responsibilities of Law Firm Management</i>	484
VI. CONCLUSION	485

I. INTRODUCTION

In recent years, members of the legal profession have increasingly spoken about the need to increase diversity within the legal profession. The American Bar Association (“ABA”) has undertaken several initiatives to increase diversity within the profession with respect to sex, race, disability, and sexual orientation.¹ Many state bars have undertaken similar measures, and numerous legal scholars have written at length on the

1. Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 5 (2013); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1092 (2011).

subject.² For their part, many large law firms have taken steps to increase racial and gender diversity within their firms.³

Despite these efforts, the underrepresentation of individuals from various groups remains a significant problem. Most people who are concerned about diversity within the legal profession are familiar with the numbers. While women are hired at law firms at a similar rate to men, women tend to drop off the pyramid to partnership at significantly higher levels.⁴ Lawyers of color continue to be underrepresented at both the entry and partnership levels.⁵ And while most of the attention so far has focused on women and racial minorities, other groups remain underrepresented in the legal profession. For example, the number of lawyers with disabilities employed at law firms remains embarrassingly low.⁶ Perhaps equally disturbing is the fact that increases in diversity in the legal profession have lagged behind gains in other professions.⁷

There is no question that lawyers from various groups are underrepresented in law firms, both at the associate and partner level. The question is how best to address this problem. Employment discrimination statutes establish a floor of permissible conduct with respect to hiring practices; employers are simply prohibited from affirmatively engaging in discriminatory practices.⁸ Diversity advocates, however, often argue for measures above and beyond the floor of nondiscrimination established by law that law firms and the legal profession more generally can take to increase the hiring and retention rates of lawyers from nontraditional backgrounds.⁹ These suggestions include such measures as expanding the pool of law school applicants,¹⁰ establishing better law firm outreach pro-

2. See, e.g., Donald S. Rencher, *SBM Young Lawyers Section Starts Program to Improve Diversity in the Legal Profession*, MICH. B.J., May 2014, at 10 (describing efforts of Young Lawyers Section to improve diversity); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004) (discussing competing justifications for increasing diversity within the legal profession).

3. See Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession's Pipeline to Power: A Study of Media Coverage of Supreme Court Nominees (Phase I, The Introduction Week)*, 84 TEMP. L. REV. 325, 336 (2012) ("Almost every large law firm today has a diversity initiative devoted to addressing equality for women and minorities in the firm.").

4. Hull, *supra* note 1, at 7.

5. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1045 (2011).

6. See Alex B. Long, *Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism*, 47 U.C. DAVIS L. REV. 1753, 1768–69 (2014) (citing statistics showing low number of lawyers with disabilities).

7. See A.B.A., PRESIDENTIAL DIVERSITY INITIATIVE, *DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS* 12 (2010) ("The legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.").

8. Age Discrimination in Employment Act, 29 U.S.C. § 623 (2012); Americans with Disabilities Act, 42 U.S.C. § 12112 (2012); 42 U.S.C. § 2000e-3 (2012).

9. See, e.g., Hull, *supra* note 1, at 19–20 (suggesting various measures to address the problem).

10. See Michael Hunter Schwartz & J.B. Smiley, Jr., *What Do You Do When Nothing Seems to Work: An Evaluation and Suggested Approach to Addressing the Diversity Issue in the Legal Profession*, ARK. LAW., Winter 2014, at 12–13 (discussing the Council on Legal Education Opportunity's proposal to expand the pool of law school applicants in order to increase diversity).

grams,¹¹ establishing better mentoring programs,¹² and mandatory law firm reporting of diversity statistics with respect to hiring and promotion.¹³ In arguing for these kinds of measures, diversity advocates frequently point out the moral, normative case for diversity as well as the more tangible benefits that flow to employers from increased diversity within law firms.¹⁴

But increasing diversity within the legal profession also requires eliminating or at least reducing instances of actual employment discrimination.¹⁵ As a result, some diversity advocates have focused on eliminating discrimination as a means of increasing diversity.¹⁶ One of the most common themes involves amending the rules of professional conduct for lawyers to expressly prohibit employment discrimination.¹⁷ Indeed, one author finds it “baffling” that the ABA has not already done so.¹⁸

There can be no doubt that discriminatory conduct on the part of a lawyer—whether in the employment context or in the course of representing a client—is particularly troublesome. The legal process is based on equality. Lawyers’ discriminatory words or conduct undermines public confidence in and respect for the judicial process as a whole by demonstrating that officers of the court do not take seriously the notions of equal treatment on which the legal system is based.¹⁹ Consequently, many states have provisions in their rules of professional conduct addressing bias in the course of representing a client or in the practice of

11. Michelle P. Crockett, *Alone on an Island: The Realities of Practicing Law for Women of Color*, MICH. BAR J., Sept. 2013, at 45; Melody Finnemore, *Promoting Diversity and Inclusion*, OR. ST. BAR BULL., Apr. 2013, at 29.

12. Shane Jasmine Young, *The Need for Diversity Champions and Sponsorship Programs in the Legal Profession*, NEV. LAW., May 2012, at 16; Rhode, *supra* note 5, at 1264.

13. Hull, *supra* note 1, at 19; Rhode, *supra* note 5, at 1074.

14. For example, the ABA’s Commission on Disability Rights has attempted to increase the hiring of lawyers with disabilities by encouraging legal employers to recognize “that the legal and business interests of our clients and the populations we serve require legal representation that reflects the diversity of our employees, customers and the communities where we operate.” A.B.A. ON DISABILITY RIGHTS, *DISABILITY DIVERSITY IN THE LEGAL PROFESSION: A PLEDGE FOR CHANGE 1* (2014) [hereinafter *PLEDGE FOR CHANGE*], available at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/pledge_for_change.authcheckdam.pdf.

15. See Wald, *supra* note 1, at 1096 (noting the connection between discrimination and underrepresentation).

16. See, e.g., *id.* at 1125–29 (describing the trend among large law firms of creating risk management procedures in order to decrease discrimination and to mitigate exposure to malpractice liability).

17. Nicole Lancia, *New Rule, New York: A Bifocal Approach to Discipline and Discrimination*, 22 GEO. J. LEGAL ETHICS 949, 960 (2009); Veronica Root, *Retaining Color*, 47 U. MICH. J.L. REFORM 575, 638 (2014); Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU. L. REV. 515, 538 (2013); Wald, *supra* note 1, at 1115. See also Hull, *supra* note 1, at 15 (discussing proposal submitted by the Institute for Inclusion in the Legal Profession to the ABA to amend the Model Rules).

18. Wald, *supra* note 1, at 1113.

19. See *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992) (“[D]iscriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession.”); FLA. RULES OF PROF. CONDUCT R. 8.4(d) cmt. 5 (stating that discriminatory conduct “subverts the administration of justice and undermines the public’s confidence in our system of justice, as well as notions of equality”).

law.²⁰ As this Article headed to press, the ABA was considering adopting a similar rule.²¹

Employment discrimination by lawyers may also result in a similar lack of trust among lawyers and the public concerning the extent to which the legal profession truly believes its own words on the subject of equality and equal justice.²² Perhaps for this reason, twelve states already have legal ethics rules that expressly prohibit employment discrimination by lawyers or that could easily be interpreted to do so.²³ It is not self-evident, however, that regulating employment discrimination through the disciplinary process is necessarily an effective or desirable means of addressing the problem. This Article examines the desirability of taking such a measure by, for the first time, examining how existing employment discrimination law impacts the ability of disciplinary authorities to apply anti-discrimination principles through rules of professional conduct governing lawyers.

Part II focuses on the law of employment discrimination as it applies in the specific context of the legal profession. This Part addresses some of the institutionalized obstacles to equal employment opportunity within the legal profession with a particular focus on some of the newer legal challenges law firms may face with respect to discrimination claims. To better assess the desirability of amending the rules of professional conduct to prohibit employment discrimination, Part III examines the rules in those states that have already adopted such an approach and the professional discipline decisions decided under those rules. Part IV addresses some of the limitations of the existing rules when examined in light of current employment discrimination law and considers whether the costs of amending the rules of professional conduct to prohibit discrimination outweigh the benefits. Finally, drawing upon the United Kingdom's experience with similar rules, Part V proposes a new rule addressing bias and discrimination both in the employment context and in the practice of law more generally.

II. EMPLOYMENT DISCRIMINATION IN THE LEGAL PROFESSION

While employment discrimination remains a serious problem, the more blatant forms of discrimination that were prevalent when Title VII of the Civil Rights Act of 1964 was enacted are less common; this is as true for law firms as it is for other types of employers.²⁴ Instead, employ-

20. See *infra* notes 121–23 and accompanying text.

21. Samson Habte, *ABA Ethics Committee Floats Anti-Bias Rule* (July 29, 2015), <http://www.bna.com/aba-ethics-committee-n17179934053/>.

22. See Wald, *supra* note 1, at 1101.

23. See *infra* notes 122–23 and accompanying text.

24. Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 70 (2011) (“Although Title VII helped women and minorities gain entry into law firms in the 1970s, the cases thirty years later are not about flat-out refusals to hire . . .”).

ment discrimination is often a problem of implicit biases and institutionalized obstacles to equal employment opportunity. As the following material explains, there is every reason to believe that these kinds of obstacles remain prevalent among legal employers. In addition, newer legal theories present employers with challenges for compliance with employment discrimination law. The following Part examines these issues.

A. *Structural Barriers to Equal Employment Opportunity*

The term “employment discrimination” frequently conjures up fairly grotesque forms of discrimination: the employer with a formal policy against hiring employees of a particular race, the supervisor who has no qualms about making sexist or racist statements in the workplace, or the employer who engages in blatant *quid pro quo* sexual harassment. These kinds of cases still certainly exist. But they are probably less common than they once were.²⁵ Today, many employers have formal policies prohibiting discrimination and ensure that their supervisors receive instruction regarding proper behavior in the workplace.²⁶

Instead, much of the discrimination that takes place in today’s workplace tends to involve more subtle forms of cognitive or unconscious bias.²⁷ As Professor Susan Sturm famously postulated, workplace biases now often result from “patterns of interaction, informal norms, networking, . . . mentoring, and evaluation”²⁸ Thus, workplace inequality is often “structurally embedded in the norms and cultural practices of an institution.”²⁹

Commentators have noted ways in which law firm practices may adversely impact certain groups. The practice of many law firms to hire only students who made strong grades at elite law schools may have a tendency to adversely impact minorities.³⁰ Female and minority lawyers have cited the lack of reliable mentors to whom they can relate as an obstacle to career development and advancement.³¹ Less formalized and more subjective promotion practices in which various cognitive and uncon-

25. See Susan Sturm, *Second-Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (explaining that these kinds of explicit forms of discrimination “are largely things of the past”).

26. *Id.* at 460.

27. *Id.*

28. *Id.* at 469.

29. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 281 (2002); Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1287 (2012).

30. See Rhode, *supra* note 5, at 1047; Floyd Weatherspoon, *The Status of African-American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259, 294–95 (2010).

31. Rhode, *supra* note 5, at 1053–56; Sterling & Reichman, *supra* note 17, at 524; Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2246 (2010).

scious biases often materialize may also work to the disadvantage of non-traditional associates seeking promotion to partner.³²

The stereotyping that often results from cognitive bias and the exclusion that may result from an organization's culture and practices may manifest itself in a variety of ways in law firms. For example, Professor Ann McGinley attributes some of the lack of diversity in law firms to "the masculine culture at law firms," which places a premium on hierarchical structure and competition.³³ This culture may also manifest itself in its preference for lawyers who are willing to work "'on demand,' free from domestic responsibilities."³⁴ This preference may impact how "choice work assignments" are distributed, which, in turn, may impact an associate's chances for advancement.³⁵ Women lawyers may also have difficulty conforming their behavior to established masculine norms in law firms, and they may be viewed as lacking leadership abilities or assertiveness.³⁶ Women may also confront such stereotypical assumptions as the notion that they are more likely to quit work after having children or are less driven to succeed more generally.

The practices and norms within a law firm may also make that firm less willing to depart from the standard operating procedures that disadvantage some lawyers within the firm. Law firms are, by nature, resistant to change.³⁷ This inflexibility may have adverse consequences for firm associates and partners who seek departures from informal norms. For example, lawyers with disabilities may need workplace accommodations to help them perform the essential functions of their jobs.³⁸ These accommodations could range from the acquisition of assistive devices to more flexible working hours to modifications of supervisory techniques.³⁹ But in a legal climate increasingly fixated on competitiveness and hyper-efficiency, these lawyers may bump up against the attitude that these kinds of accommodations amount to a nuisance or are simply "not the

32. Sterling & Reichman, *supra* note 17, at 530 (citing study showing that "[w]omen's chances [for advancement] were far less in law firms with more casual, less well defined, and informal structures" for promotion decisions).

33. Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423, 424, 429 (2013).

34. Sterling & Reichman, *supra* note 17, at 519; *see also* Rhode, *supra* note 5, at 1051 ("[O]thers, even those working full-time, are assumed to be less available and committed, an assumption not made about fathers.").

35. *See* Sterling & Reichman, *supra* note 17, at 523–24 (referring to a case study in which female lawyers reported not being assigned work based on feminine stereotypes).

36. McGinley, *supra* note 33, at 429; Rhode, *supra* note 5, at 1051; Sterling & Reichman, *supra* note 17, at 520.

37. *See* Levit, *supra* note 24, at 70 (referring to the pace of change at law firms as being "glacially slow"); Rhode, *supra* note 5, at 1056 (referencing "inflexible practice structures" at law firms); Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure*, 55 DRAKE L. REV. 165, 193 (2006) (describing law firm culture as being "highly resistant to change").

38. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Reasonable Accommodations for Attorneys with Disabilities*, <http://www.eeoc.gov/facts/accommodations-attorneys.html> (last modified Feb. 2, 2011).

39. *See id.*

way we do things around here.”⁴⁰ So, for example, while the vast majority of law firms report that they have policies permitting part-time work, few lawyers actually take advantage of them for fear of the adverse consequences on their careers.⁴¹

B. *New Issues for Employers*

In addition to traditional types of statutory discrimination claims, employers within the last twenty-five years have had to contend with new statutory restrictions on their discretion as well as new and evolving theories of liability.⁴² Legal employers are not immune to these changes. Indeed, these changes may have greater potential implications for law firms than for other employers.

One relatively new area of potential liability for law firms involves discrimination claims from firm partners. In 1984, the Supreme Court held in a lawsuit involving a sex discrimination claim by a law firm associate against the firm of King & Spalding that Title VII was applicable to the selection of partners by a partnership.⁴³ A concurring opinion by Justice Powell, however, emphasized that the Court’s holding was limited to a claim by a firm associate against the partnership and that Title VII would have no application to a claim by a partner against the partnership.⁴⁴ Nearly twenty years later, the Court made clear in *Clackamas Gastroenterology Associates, Inc. v. Wells* that the designation of an individual as a “partner” is not a guarantee of immunity under Title VII.⁴⁵ While recognizing that only “employees” are entitled to protection under Title VII, the Court explained that one designated as a partner in a firm could still qualify as an employee under common-law agency principles.⁴⁶ Thus, to the extent that a shareholder lacks the power to manage the business of the partnership, the shareholder should be treated as an employee for purposes of Title VII.⁴⁷ In an age of multi-tiered law firm partnership tracks, the *Clackamas* decision has obvious implications for law firms.⁴⁸ Numerous lawyers have since brought suit following the decision, alleging that they were partners in name only and were thus proper plaintiffs under *Clackamas*.⁴⁹

40. This is also a particular problem for female lawyers given the fact that women still tend to shoulder the majority of child caregiving responsibilities. See Rhode, *supra* note 5, at 1057 (discussing the particular impact that part-time work practices have on female lawyers).

41. *Id.* at 1056.

42. See Alex B. Long, “If the Train Should Jump the Track . . .”: *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 475 (2006).

43. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

44. *Id.* at 79 (Powell J., concurring).

45. 538 U.S. 440, 450 (2003).

46. *Id.* at 449.

47. *Id.* at 450.

48. See, e.g., Jessica Fink, *A Crumbling Pyramid: How the Evolving Jurisprudence Defining ‘Employee’ Under the ADEA Threatens the Basic Structure of the Modern Large Law Firm*, 6 HASTINGS BUS. L.J. 35, 37 (2010) (noting the impact of the decision in the legal field).

49. See *id.* at 49 & n.97 (listing cases).

While Title VII has prohibited sex discrimination for fifty years, most federal courts have held that Title VII does not prohibit discrimination on the basis of sexual orientation.⁵⁰ In recent years, however, an increasing number of states and localities have enacted statutes and ordinances prohibiting employment discrimination on the basis of sexual orientation.⁵¹ In some jurisdictions where LGBT plaintiffs are not able to take advantage of such measures, they may be able to bring a sex discrimination claim under Title VII on the theory that the employer engaged in impermissible sex stereotyping.⁵²

Second generation employment discrimination statutes may pose special problems for law firms. Title VII and the Age Discrimination in Employment Act (“ADEA”)⁵³ both employ an equality approach to workplace discrimination; employers must treat their employees equally. The Americans with Disabilities Act (“ADA”),⁵⁴ however, requires employers to do more than simply refrain from making decisions on the basis of an individual’s disability. Discrimination under the ADA also includes the failure to make reasonable accommodations to the known impairments of employees with disabilities.⁵⁵ To provide equality of opportunity for employees with disabilities, the ADA may require that an employer modify its normal operating procedures or workplace policies.⁵⁶ Thus, the ADA might require an employer to permit flexible or part-time work schedules, telecommuting, or changes in how the employer supervises or gives instructions to an employee with a disability.⁵⁷

The “reasonable accommodation” requirement may pose a special challenge for law firms, where long hours, “face time” with partners, and a “top-down” and “hands-off” approach to instruction and supervision are often the norm.⁵⁸ Yet, the ADA’s “reasonable accommodation” requirement proceeds from the premise that employers are not permitted to insist upon a one-size-fits-all approach and may be required, within reason, to modify existing policies and practices.⁵⁹ The “reasonable accommodation” requirement has taken on increased importance in recent years as a result of amendments to the ADA. The ADA Amendments

50. Neel Rane, Note, *Twenty Years of Shareholder Proposals After Cracker Barrel: An Effective Tool for Implementing LGBT Employment Protections*, 162 U. PA. L. REV. 929, 933 (2014).

51. *Id.* at 934–35.

52. *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–65 (3d Cir. 2001).

53. 29 U.S.C. § 623 (2012); 42 U.S.C. § 2000e et. seq. (2012).

54. 42 U.S.C. § 12101.

55. 42 U.S.C. § 12112(b)(5)(A).

56. See Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1150 (2010) (“Changing standard operating procedures is the gist of accommodation and the dominant theme in the EEOC regulations concerning the statutory term.”).

57. See 42 U.S.C. § 12111(9)(B); U.S. EQUAL EMP’T OPPORTUNITY COMM’M, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION, www.eeoc.gov/facts/telework.html (last modified Oct. 27, 2005). See also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC NO. 915.002, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES para. 26 (1997), available at 1997 WL 34622315, at *13.

58. See Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 445 (2012) (noting high billable targets and significant face time expectations at large law firms).

59. See *supra* note 56 and accompanying text.

Act of 2008 (“ADAAA”)⁶⁰ dramatically expanded the definition of “disability” under the statute.⁶¹ Thus, more individuals will now qualify as having a disability and may be entitled to reasonable accommodations in the workplace.⁶²

The Family and Medical Leave Act (“FMLA”)⁶³ also defines discrimination in a manner different from first generation discrimination statutes. FMLA requires larger employers to provide unpaid leave from work for serious medical conditions of employees and close family members.⁶⁴ Thus, FMLA may require law firms to grant associates time off from work in order to tend to family responsibilities involving health care. While FMLA coverage is limited to employers with fifty or more employees and only applies where a serious health condition is involved, a few states and many localities have included family responsibilities or related concepts in their employment discrimination laws.⁶⁵ Thus, employers may be prohibited in some states and localities from discriminating on the basis of family responsibilities, family status, or parenthood.⁶⁶ To the extent taking time off from work in order to tend to family responsibilities proves to be at odds with the culture within a firm, female associates are more likely to suffer than male associates.⁶⁷ As the caselaw attests, however, men are not immune from family responsibilities discrimination.⁶⁸ And, of course, lawyers live in a world in which face time, required billable hours, and strict deadlines are a part of life. Therefore, the potential for firm practices to come into conflict with FMLA or state or local law covering family responsibilities is perhaps greater than in other workplaces.

III. ANTI-DISCRIMINATION AS A MATTER OF ETHICS

In an effort to increase diversity and reduce the instances of employment discrimination within the legal profession, various authors and organizations have suggested amending the rules of professional conduct

60. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555 (codified at 42 U.S.C. § 12101 (2012)).

61. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 219 (2008).

62. Cheryl L. Anderson & Leonard Gross, *Discrimination Claims Against Law Firms: Managing Attorney-Employees from Hiring to Firing*, 43 TEX. TECH L. REV. 515, 523 (2011).

63. 29 U.S.C. §§ 2615(a)–(b).

64. 29 U.S.C. § 2612(a)(1).

65. Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Employee Action?*, 42 CONN. L. REV. 1139, 1161 (2010).

66. See, e.g., ALASKA STAT. § 18.80.220(a)(1) (2014) (parenthood); Human Rights Act, D.C. CODE § 2-1401.01 (family responsibilities and familial status); S.F., CAL., ADMIN. CODE ch. 12Z (2015) (parental responsibility).

67. See Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1285–86 (2008) (discussing family responsibilities discrimination as a form of sex discrimination).

68. See Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 257 (2013) (discussing sex-discrimination cases involving men).

to prohibit employment discrimination.⁶⁹ A number of states have already amended their ethical rules in a variety of ways to address the problems of bias and discrimination in the legal profession, including employment discrimination. The following Part discusses some of the rule-based changes that have been proposed or adopted and examines the experiences of states that have made such changes.

A. Existing Rules

1. Conduct Prejudicial to the Administration of Justice

The most direct statement within the ABA Model Rules of Professional Conduct condemning discrimination actually appears in a comment. Model Rule 8.4(d) prohibits a lawyer from engaging in conduct prejudicial to the administration of justice.⁷⁰ Comment 3 to the rule explains that “[a] lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status” may violate the rule.⁷¹ Several states have gone a step further and incorporated the language of Comment 3 within the black letter of Rule 8.4.⁷²

Given the fact that the language focuses on a lawyer who manifests bias “in the course of representing a client,” the rule does not seem to be designed to address employment discrimination.⁷³ Indeed, courts typically limit application of the rule to conduct that “undermines the legitimacy” of an identifiable case or process.⁷⁴ As a result, most of the cases involving violations of the rule based on the expression of bias involve lawyers who have impermissibly interjected race or some other characteristic into a proceeding.⁷⁵ Some states have rules of professional con-

69. See *supra* note 17 and accompanying text.

70. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1983).

71. *Id.* cmt. 3.

72. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 8.4(d) (2015); see also R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (2015). The text of Rhode Island's rule is not limited to conduct occurring in the course of representing a client, but the comment to the rule speaks only to such conduct. R.I. RULES OF PROF'L CONDUCT R. 8.4(d) cmt. 3.

73. One exception would be Missouri, whose Rule 8.4(g) prohibits a lawyer from manifesting bias or prejudice in the course of representing a client, but also includes a comment explaining that the rule may be violated through sexual harassment occurring in the employment context. MISSOURI RULES OF PROF'L CONDUCT R. 8.4(g) cmt 4 (2015).

74. Fla. Bar v. McLawhorn, 505 So. 2d 1338, 1341 (Fla. 1987) (quoting Polk v. State Bar of Texas, 374 F.Supp. 784, 788 (N.D. Tex. 1974)); *In re Spikes*, 881 A.2d 1118, 1126 (D.C. 2005). Texas specifically limits its rule in this manner. See TEX. DISC. RULES OF PROF'L CONDUCT R. 5.08 (2015) (prohibiting a lawyer from manifesting bias in connection with an adjudicatory proceeding).

75. See, e.g., *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (disciplining a lawyer who made repeated references before the jury about the fact that the ex-wife (a white woman) of his client was living with “a black man” or “a black guy”); *In re Charges of Unprofessional Conduct Contained in Panel Case No. 15976*, 653 N.W.2d 452 (Minn. 2002) (disciplining lawyer who sought to have judge's disabled law clerk removed from the courtroom); Fla. Bar v. Martocci, 791 So.2d 1074 (Fla. 2001) (disciplining lawyer who engaged in “sexist, racial, and ethnic insults” during depositions). See also MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2015) (prohibiting a lawyer from engaging in conduct manifest-

duct that specifically prohibit a lawyer, in the course of representing a client, from engaging in conduct that “is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status.”⁷⁶ Thus, while the rule and comment stand as important expressions of the legal profession’s intolerance for expressions of bias or prejudice, they are limited in their scope.

2. *Discrimination in a Lawyer’s Professional Capacity*

The rules of professional conduct in several states prohibit a lawyer from engaging in discrimination or manifesting bias on the basis of race or other identity characteristics in the lawyer’s “professional capacity” or in “the practice of law.”⁷⁷ Nearly all of the disciplinary decisions under this type of rule involve a lawyer making discriminatory comments concerning judges,⁷⁸ clients,⁷⁹ or other parties.⁸⁰ This type of rule has also been extended to reach unwanted sexual advances toward a client.⁸¹

Because the rule focuses on a lawyer’s discriminatory conduct occurring in the lawyer’s “professional capacity,” as opposed to in the course of representing a client, the rule is potentially broad enough to include employment discrimination. For example, a comment to Maryland’s Rule 8.4 advises that sexual harassment involving coworkers may violate the rule.⁸² New Jersey has a similar rule, which explicitly references the fact that it covers employment discrimination.⁸³

There are few instances in which lawyers have faced potential discipline under these kinds of rules for engaging in employment discrimina-

ing bias or prejudice while appearing in a professional capacity before a tribunal). The comment to the rule itself expresses a concern about the discriminatory use of peremptory strikes. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 3.

76. COLO. RULES OF PROF’L CONDUCT R. 8.4(g) (2015) (emphasis added); *see also* IDAHO RULES OF PROF’L CONDUCT R. 4.4(a)(1) (2015) (prohibiting conduct intended to appeal to or engender bias against a participant in court proceeding).

77. *See, e.g.*, IND. RULES OF PROF’L CONDUCT R. 8.4(g) (2015); IOWA RULES OF PROF’L CONDUCT R. 32:8.4 (2015); N.J. RULES OF PROF’L CONDUCT R. 8.4(g) (2015).

78. *In re* Geller, No. DRB 02-467, 1, 39 (N.J. 2003), <http://njlaw.rutgers.edu/collections/dr/decisions/02-467.pdf>.

79. *See In re* Pinto, No. DRB 00-049, 1, 16 (N.J. 2000), <http://njlaw.rutgers.edu/collections/dr/decisions/00-049.pdf> (disciplining a lawyer for making crude sexually explicit comments to client).

80. *In re* Dempsey, 986 N.E.2d 816 (Ind. 2013) (disciplining a lawyer under Rule 8.4(g) after he made various anti-Semitic statements about opposing parties); *In re* Kelley, 925 N.E.2d 1279 (Ind. 2010) (reprimanding lawyer who asked company representative if he was “gay” or “sweet”); *In re* McCarthy, 938 N.E.2d 1279 (Ind. 2010) (suspending a lawyer for thirty days for making racist statement to third party).

81. *See In re* Pinto, No. DRB 00-049 at 14 (disciplining a lawyer for making crude sexually explicit comments to client).

82. MD. LAWYERS’ RULES OF PROF’L CONDUCT R. 8.4 cmt. 3 (2015). Iowa’s rule likewise prohibits sexual harassment and also prohibits “other unlawful discrimination,” thus perhaps suggesting that it covers employment discrimination. IOWA RULES OF PROFESSIONAL CONDUCT R. 32:8.4(g) (2015).

83. N.J. RULES OF PROF’L CONDUCT R. 8.4(g) (2015) (noting that employment discrimination is only covered “where there has been a prior final agency or judicial determination” of discrimination on the part of the lawyer)

tion. For example, nearly every reported disciplinary decision under New Jersey's rule involves discriminatory words or conduct directed at nonemployees, such as clients or judges.⁸⁴ A review of the reported disciplinary decisions in New Jersey produced only one case in which a lawyer licensed in New Jersey faced possible discipline for employment discrimination, and that case involved alleged employment discrimination against a lawyer's secretary, not another lawyer.⁸⁵

3. *Harassment*

A few states have adopted rules of professional conduct that prohibit lawyers from engaging in harassment in connection with a lawyer's professional activities.⁸⁶ For example, Minnesota prohibits a lawyer from harassing a person "on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with a lawyer's professional activities."⁸⁷ On their face, these kinds of rules appear broad enough to cover workplace harassment. Indeed, in some states, the rules reference harassment in relation to "other [forms of] unlawful discrimination."⁸⁸

While this type of rule, on occasion, has been applied in the employment setting,⁸⁹ the clear majority of the reported disciplinary decisions under this type of rule have involved harassment outside of the employment context. For example, one Minnesota lawyer was charged under the rule after making a series of statements to a client in the course of seeking to collect outstanding legal fees that amounted to harassment on the basis of religion or national origin.⁹⁰ Another Minnesota lawyer was disciplined for engaging in a pattern of bad faith litigation that included harassing statements toward judges and others.⁹¹ But easily the most common form of misconduct under this type of rule involves unwelcome sexual advances and related forms of sexual misconduct toward

84. *In re Geller*, No. DRB 02-467, 1, 43 (N.J. 2003), <http://njlaw.rutgers.edu/collections/drb/decisions/02-467.pdf> (reprimanding a lawyer for, *inter alia*, making discriminatory remarks about a judge); *In re Pinto*, No. DRB 00-049 at 14 (disciplining a lawyer for making crude sexually explicit comments to client). See also *In re Walterschied*, Nos. DRB 00-234 and DRB 00-235 (2001), <http://njlaw.rutgers.edu/collections/drb/decisions/00-235.pdf> (disciplining a lawyer for, *inter alia*, engaging in sexual harassment of a client).

85. *In re Gourvitz*, Docket No. DRB 05-117, 1, 1 (N.J. 2005), <http://njlaw.rutgers.edu/collections/drb/decisions/05-117.pdf>.

86. IOWA RULES OF PROF'L CONDUCT R. 8.4(g); MINN. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); WIS. RULES OF PROF'L CONDUCT R. 8.4(i) (2015).

87. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2015); MINN. RULES OF PROF'L CONDUCT R. 8.4(g).

88. IOWA RULES OF PROF'L CONDUCT R. 8.4(g); see also WIS. RULES OF PROF'L CONDUCT R. 8.4(i) comm. cmt. ("What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law.").

89. *In re Ward*, 726 N.W.2d 497, 497 (Minn. 2007) (involving unwanted sexual contact with a non-lawyer applicant for employer).

90. *In re Woroby*, 779 N.W.2d 825, 825 (Minn. 2010).

91. *In re Nett*, 839 N.W.2d 716, 718 (Minn. 2013).

clients and others in connection with the practice of law.⁹² Thus, for example, a prosecutor was suspended for sending a series of sexualized text messages to a domestic abuse victim.⁹³

4. *Discrimination in Violation of Law*

Several states prohibit lawyers from engaging in discriminatory conduct in violation of the law.⁹⁴ For example, Minnesota prohibits a lawyer from committing a discriminatory act “prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer’s fitness as a lawyer.”⁹⁵ Washington contains a similar restriction, but does not require that the discrimination reflect adversely on the lawyer’s fitness as a lawyer.⁹⁶

Some have raised concerns over the breadth of these kinds of rules, noting their potential impact on the ability of lawyers to choose which clients they wish to represent.⁹⁷ But there can be little doubt that these rules would reach employment discrimination that is illegal under the law. Moreover, the fact that these rules reference state or local law is significant in that state or local law may prohibit various forms of discrimination (i.e., discrimination on the basis of sexual orientation) that is not prohibited by federal law.

There are almost no reported decisions involving violations of this type of rule.⁹⁸ And, again, disciplinary decisions under these rules that

92. Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 124 (1999) (suspending a lawyer under older version of ethical rules prohibiting “sexual harassment or other unlawful discrimination”); *In re Walterschied*, Nos. DRB 00-234 and DRB 00-235 at 19 (N.J. 2001), <http://njlaw.rutgers.edu/collections/dr/decisions/00-235.pdf> (disciplining a lawyer for, *inter alia*, engaging in sexual harassment of a client); *In re Dudley*, 2013-OLR-5, 1, 2 (Wis. 2013), <http://www.wicourts.gov/services/public/lawyerreg/statuspublic/dudley.pdf> (publicly reprimanding a lawyer for sending sexualized e-mails to client); *In re Kratz*, 851 N.W.2d 219, 223 (Wis. 2014) (suspending county district attorney for sending inappropriate text messages to a crime victim and making inappropriate statements to others). Iowa’s version of the rule prohibits sexual harassment “in the practice of law,” which the Iowa Supreme Court has held applies to harassment directed against non-clients, provided it occurs while the attorney is engaged in the practice of law. Iowa Supreme Court Disc. Bd. v. Moothart, 860 N.W.2d 598, 603 (Iowa 2015). Thus, “[t]he rule may be violated if a lawyer sexually harasses witnesses, court personnel, law partners, law-office employees, or other third parties that come into contact with a lawyer engaged in the practice of law.” *Id.*

93. *In re Kratz*, 851 N.W.2d at 221.

94. See ILL. RULES OF PROF’L CONDUCT R. 8.4(j) (2015); IOWA R. OF PROF’L CONDUCT R. 8.4(g) (2015) (prohibiting sexual harassment and other forms of unlawful discrimination); MINN. RULES OF PROF’L CONDUCT R. 8.4(h) (2015); OHIO RULES OF PROF’L CONDUCT R. 8.4(g) (2015); WASH. RULES OF PROF’L CONDUCT R. 8.4(g) (2015).

95. MINN. RULES OF PROF’L CONDUCT R. 8.4(h).

96. WASH. RULES OF PROF’L CONDUCT R. 8.4(g). The rule is also limited to acts that violate Washington state law.

97. The most famous example of this is the case of *Stropnicki v. Nathanson*, 19 M.D.L.R. 39 (MCAD Feb. 25, 1997), in which the Massachusetts Commission Against Discrimination ruled that a law firm that chose to represent only women in divorce cases violated Massachusetts civil rights law by engaging in sex discrimination. See Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 W. NEW ENG. L. REV. 79, 91 (1998) (criticizing the decision).

98. According to a representative of the Minnesota Office of Lawyers Professional Responsibility, there had been only one instance of professional discipline—a stipulation for private probation—

specifically involve employment discrimination are likewise rare. In one of the few reported cases, an Ohio lawyer was accused by multiple employees of sexual harassment.⁹⁹ Applying the same standards applied in Title VII discrimination cases, the Ohio Supreme Court found that the lawyer had engaged in professional misconduct under Ohio's version of the rule by creating a hostile work environment on the basis of sex in one instance.¹⁰⁰

5. *Employment Discrimination*

Finally, a few states have rules of professional conduct that specifically prohibit lawyers from engaging in discrimination in the employment context.¹⁰¹ Vermont's Rule 8.4(g) is representative and essentially reads like a combination of various federal employment discrimination statutes. Under the rule, a lawyer may not "discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual."¹⁰² With the exception of the prohibition on discrimination on the basis of sexual orientation, which is not prohibited by federal law, Vermont's Rule 8.4(g) largely tracks the major federal employment discrimination statutes.

There is some variation in terms of the rules' coverage. For example, the District of Columbia stands alone in prohibiting discrimination on the basis of family responsibility.¹⁰³ New York prohibits discrimination on the basis of marital status, but oddly omits religion.¹⁰⁴ But all of the rules that address employment discrimination prohibit discrimination on the basis of race, national origin, sex, sexual orientation, age, disability, and (with the exception of New York) religion in the conditions of employment.¹⁰⁵

Interestingly, several of the rules express a preference for resolution of a discrimination claim through the legal process before the disciplinary process should commence.¹⁰⁶ For example, California's Rule 2-400(B)(2)

for violation of Minnesota's version of this rule between 1992 and 2014. E-mail, July 31, Patrick Burns, Minnesota Office of Lawyers Professional Responsibility (on file with author).

99. *Cincinnati Bar Ass'n. v. Young*, 731 N.E.2d 631, 638 (Ohio 2000). One of the employees was a law student working as a legal assistant. *Id.* at 634. Another appears to have been contemplating applying for admission to the Ohio Bar. *Id.* at 636. The others were hired as legal assistants. *Id.* at 636-37.

100. *Id.* at 637-38.

101. CAL. RULES OF PROF'L CONDUCT R. 2-400(B)(2) (2015); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2015); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2015).

102. VT. RULES OF PROF'L CONDUCT R. 8.4(g).

103. D.C. RULES OF PROF'L CONDUCT R. 9.1.

104. N.Y. RULES OF PROF'L CONDUCT R. 8.4(g).

105. See D.C. RULES OF PROF'L CONDUCT R. 9.1; VT. RULES OF PROF'L CONDUCT R. 8.4(g).

106. This is also true of Illinois' statute, which simply prohibits discrimination that violates a federal, state, or local statute. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2015).

provides that “[n]o disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.”¹⁰⁷ A tribunal finding or verdict as to unlawful discrimination may be introduced as evidence of violation of the rule, but discipline may not be imposed until the underlying judgment is final.¹⁰⁸

In addition to the existing rules, several scholars have offered their own proposed rules prohibiting employment discrimination by lawyers. For example, Professor Eli Wald has proposed amending a comment to Rule 8.4(d)’s prohibition on conduct prejudicial to the administration of justice that would explicitly prohibit discrimination in employment practices.¹⁰⁹ Wald’s proposed amendment contains at least two noteworthy features.

First, in addition to prohibiting discrimination on the basis of race and other characteristics commonly listed in employment discrimination statutes, Wald’s amendment would also prohibit discrimination on the basis of socioeconomic status,¹¹⁰ a characteristic not protected under federal discrimination statutes or commonly protected under state statutes. Second, under Wald’s proposal, discrimination “could be evidenced by hiring and promotion policies which result in patterns of under-representation of minorities based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”¹¹¹ This part of Wald’s proposal is inextricably tied to Wald’s ultimate goal of promoting diversity within the legal profession.¹¹² His reference to proving discrimination by establishing “patterns of under-representation,” however, sounds quite similar to a so-called “pattern and practice” action. Pattern and practice cases are a specific form of employment discrimination actions in which plaintiffs seek to prove that discrimination was the employer’s standard operating procedure.¹¹³ This is frequently done through the use of statistics purporting to demonstrate systemic discrimination.¹¹⁴ The focus in such cases is on the existence of a policy or practice of intentional discrimination affecting a class of employees as opposed to single, isolated instances of discrimination. Wald’s proposal might also be read to mean that lawyers could be subject to discipline under a disparate impact theory. Under this approach, disciplinary authorities could discipline lawyers in firms that employed hiring or promotion policies that resulted

107. CAL. RULES OF PROF’L CONDUCT R. 2-400(C) (2015).

108. *Id.*

109. Wald, *supra* note 1, at 1115.

110. *Id.* at 1115.

111. *Id.*

112. *See id.* at 1115 (explaining that “by limiting the scope of their anti-discrimination rules to prohibit only conduct by existing antidiscrimination law, 188 states have implicitly exempted under-representation”).

113. *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

114. *Id.* at 340 n.20.

in statistical underrepresentation, even if producing such a result was not the employer's intent.¹¹⁵

A review of the available disciplinary decisions in states with rules expressly prohibiting employment discrimination quickly leads to the conclusion that professional discipline for engaging in employment discrimination is rare.¹¹⁶ Discipline involving one lawyer engaging in employment discrimination against another is rarer still.¹¹⁷ For example, California's Rule 2-400(B), which prohibits discrimination in "hiring, promoting, discharging, or otherwise determining the conditions of employment of any person" has been in place since 1994. A Westlaw search, however, reveals exactly zero disciplinary decisions involving the rule.

6. *General Misconduct Rules*

Finally, some lawyers have faced professional discipline even in the absence of professional conduct rules that speak specifically to discriminatory conduct. For example, in a Colorado case, a lawyer who engaged in a pattern of sexual harassment of employees was suspended for violating a rule of professional conduct prohibiting conduct that reflects adversely on the lawyer's fitness to practice law.¹¹⁸ One justification for imposing discipline in these cases, even absent a rule that specifically addresses discrimination, is that discriminatory conduct on the part of a lawyer "signals an indifference to ethical obligations and disregard for the law which reflects adversely on respondent's fitness to practice law."¹¹⁹ In theory, a lawyer who engages in employment discrimination in a state with a professional conduct rule that generally prohibits conduct reflecting adversely on the lawyer's fitness to practice law could be subject to discipline.¹²⁰ Most of the disciplinary decisions under these types of general conduct rules, however, have involved lawyers who have engaged in sexual harassment of non-employees, most often clients.¹²¹

115. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

116. *See* Wald, *supra* note 1, at 1115 (stating that "even in jurisdictions that explicitly deem discrimination regarding terms of employment professional misconduct, such as California, the District of Columbia, and New York, there have been no disciplinary actions enforcing these rules").

117. The only decision I could find in a jurisdiction that expressly prohibits discrimination involved discrimination by an attorney against a project assistant. Letter from Joyce E. Peters, Bar Counsel, to James H. Cohen, Esquire (Mar. 28, 2002) (on file with the District of Columbia Bar).

118. *People v. Lowery*, 894 P.2d 758, 760 (Colo. 1995) (per curiam).

119. *In re Discipline of Peters*, 428 N.W.2d 375, 382 (Minn. 1988).

120. Unless the discriminatory conduct amounted to a crime, a lawyer who engages in employment discrimination would not be subject to discipline for violating Model Rule 8.4(d), which prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law. MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (1983).

121. *See In re Yarborough*, 524 S.E.2d 100, 104–05 (S.C. 1999).

IV. LIMITATIONS ON ADDRESSING EMPLOYMENT DISCRIMINATION THROUGH RULES OF PROFESSIONAL CONDUCT AND SUGGESTIONS FOR CHANGE

All told, there are approximately twelve states that have rules specifically prohibiting employment discrimination, that have been read to do so, or that probably do so.¹²² There are few reported instances of professional discipline under these rules that involve employment discrimination.¹²³ The fact that these states already have in place rules of professional conduct that specifically prohibit or otherwise cover employment discrimination in the legal profession demonstrates that disciplinary rules can be amended to promote diversity and eliminate discrimination. The fact that precious few lawyers, however, have ever been successfully prosecuted under these rules raises questions as to how effective these rules really are and how effective they could be in rooting out employment discrimination. The following Part examines these issues.

A. Structural Limitations on the Ability of Ethics Rules to Address Employment Discrimination

Perhaps one reason there are so few disciplinary decisions involving employment discrimination is that there are relatively few complaints of discrimination filed with disciplinary authorities. Compared with other categories of misconduct, complaints involving discrimination appear to be uncommon.¹²⁴ There are a number of structural limitations, however, involving the disciplinary process that undoubtedly contribute to both the low number of complaints and the low number of disciplinary actions involving employment discrimination.

122. CAL. RULES OF PROF'L CONDUCT R. 2-400(B)(1) (2015); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2015); ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2015); IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); IOWA R. OF PROF'L CONDUCT R. 32:8.4(g) (2015); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2015); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015); WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS R. 8.4(i) (2015).

123. I conducted a Westlaw search of disciplinary decisions in each of the twelve jurisdictions. In addition, where a jurisdiction maintains a searchable database of disciplinary decisions, I searched those. Professional discipline may include private reprimand (i.e., a reprimand that is not made public). But their private reprimands are difficult to research.

124. For example, the 2013 Annual Report of the Illinois Attorney Registration and Disciplinary Commission reports just two complaints of discrimination, compared to 2,408 complaints of neglect. Annual Report of 2013, ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION 15 (Apr. 29, 2014), <https://www.iardc.org/AnnualReport2013.pdf>. Neither of the two complaints resulted in formal disciplinary charges. *Id.* at 23. According to one representative of a disciplinary commission with whom I communicated, the commission does keep track of the number of complaints received involving general categories of misconduct, but has not established a category for complaints involving discriminatory conduct, primarily because there have been so few complaints. E-mail from Charles Harrington, Iowa Att'y Disciplinary Board (July 28, 2014) (on file with author).

1. Resources

Perhaps the most obvious limitation on the ability of the disciplinary process to effectively address employment discrimination in the legal process is the lack of resources. Some rules of professional conduct go unenforced or under-enforced due to budgetary constraints.¹²⁵ Constrained by limited resources, disciplinary authorities, as rational actors, can be expected to focus their attention on what they deem to be the most significant rule violations.¹²⁶ While employment discrimination in the practice of law is certainly an important issue, it is not the type of issue most disciplinary prosecutors signed up to prosecute when they became prosecutors. Employment discrimination is simply not the kind of ethical violation that most prosecutors think about when they think about ethical violations.

Given the availability of a pre-existing body of law designed to address and remedy employment discrimination, disciplinary authorities could be expected to preserve scarce resources and allow the judicial process to address the issue. The wisdom of such a course of action is borne out when one considers the reality that employment discrimination litigation is often quite time-consuming and dependent on discovery.¹²⁷ It is a relatively straightforward matter to establish that a lawyer made discriminatory statements to opposing counsel in a deposition or to a third party in the course of representing a client. It is far more difficult and time-consuming to prove that race or some other impermissible factor was a motivating factor behind a lawyer's decision not to hire or promote another lawyer. Likewise, to the extent disciplinary authorities are asked to root out systemic intentional discrimination within law firms or to pursue disparate impact claims by relying on statistical analysis to establish that a specific employment practice had a disparate impact on the hiring or promotion of particular groups, they would be asked to undertake tasks requiring significant resources.¹²⁸ It would be difficult for any state disciplinary agency to effectively police both individual instances of employment discrimination and more systemic forms of discrimination that may take place at larger law firms. Indeed, faced with its own resource problem, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcing discrimination

125. Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 974 (2002).

126. See *id.* at 1003 (attributing some of the underenforcement of the rules regarding attorney advertising to the possibility that "disciplinary agencies with limited resources may consider other rule violations more important").

127. JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 13:5 at 13-7 (2d ed. 2011) ("All litigation is expensive and employment discrimination litigation is particularly so.")

128. See Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 703 (2005) (referring to systemic discrimination cases as "complicated, expensive, and time consuming"); Laya Sleiman, *A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine*, 72 FORDHAM L. REV. 2677, 2712 (2004) (referring to disparate impact cases as "expensive, time consuming, and difficult to win").

law, has chosen to focus on systemic discrimination cases involving multiple plaintiffs rather than individual-plaintiff cases so as to maximize the impact of its enforcement efforts.¹²⁹

The problem of scarce resources is only compounded if disciplinary authorities are expected to address new theories of liability and new forms of prohibited discrimination. For instance, prohibiting lawyers from engaging in family responsibilities discrimination, as does the District of Columbia, would force disciplinary authorities to delve into a fairly technical body of law, FMLA, complete with an elaborate set of technical regulations.¹³⁰ Adopting a rule that prohibits lawyers from engaging in discrimination on the basis of socioeconomic status—as Professor Wald’s proposal would¹³¹—would introduce a different problem. There is very little law on the subject of employment discrimination on the basis of socioeconomic status, thus likely forcing disciplinary authorities to establish an entirely new set of standards to guide their enforcement efforts. Ultimately, disciplinary agencies, as currently constituted, may lack the resources necessary to effectively address employment discrimination.

2. *Discrimination Lawsuits as a Condition Precedent Professional Discipline*

A related explanation for the limited number of disciplinary decisions involving employment discrimination and a potential limitation on the overall effectiveness of ethical rules prohibiting discrimination is the requirement in some jurisdictions that there must first be a judicial finding of discrimination before professional discipline may be imposed. For example, California requires that before professional disciplinary proceedings involving employment discrimination can be instituted, there must first be a judicial finding in a legal proceeding that such discrimination has taken place.¹³² The reality is that few employment discrimination plaintiffs actually survive summary judgment, proceed through trial, and ultimately prevail before a jury.¹³³ Discrimination cases are notoriously

129. See William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 468 (2013) (discussing the EEOC’s decision to focus on systemic discrimination); Martha Neil, *EEOC Takes Bigger Aim: Commission Announces a ‘Systemic’ Focus on Discrimination Cases*, 5 No. 16 ABA J. E-REPORT 4 (Apr. 21, 2006), available at 5 No. 16 ABAJEREP 4 (WestlawNext) (describing the EEOC’s decision to put more emphasis on “high-impact cases, including those that involve multiple plaintiffs”); Maurice Wexler et al., *The Law of Employment Discrimination From 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 349, 382–83 (2010) (discussing EEOC’s Systemic Program, with its focus on multiple-plaintiff cases).

130. See Shay Ellen Zeemer, *FMLA Notice Requirements and the Chevron Test: Maintaining a Hard-Fought Balance*, 55 VAND. L. REV. 261, 262 (2002) (noting the complexity of FMLA’s provisions).

131. See *supra* notes 109–12 and accompanying text.

132. See *supra* notes 107–08 and accompanying text.

133. See generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 103 (2009) (asserting employment discrimination plaintiffs “have a tough row to hoe” in federal court).

difficult to win for plaintiffs.¹³⁴ This is at least as true for plaintiffs suing law firms as it is for other kinds of plaintiffs.¹³⁵ Indeed, for reasons discussed later in this Article,¹³⁶ employment discrimination lawsuits by lawyers suing their law firms are relatively rare.¹³⁷ Therefore, to the extent a jurisdiction seeks to preserve disciplinary resources by requiring a finding of discrimination as a condition precedent to disciplinary action, there are likely to be few disciplinary actions.

In some jurisdictions, a judicial finding of employment discrimination is not a prerequisite to professional discipline.¹³⁸ Disciplinary authorities, however, may be prohibited from proceeding until there has at least been a resolution of a judicial proceeding involving the same set of facts. In New York, for example, a complaint regarding employment discrimination must first be brought before some tribunal other than New York's Disciplinary Committee.¹³⁹ If there is a finding that the defendant engaged in unlawful discrimination, that determination serves as prima facie evidence of professional misconduct.¹⁴⁰ But the fact that a legal employer prevailed in an underlying discrimination lawsuit would seem likely to deter disciplinary authorities from pursuing disciplinary action.

3. *The Clear and Convincing Standard*

The fact that disciplinary authorities typically must establish misconduct through clear and convincing evidence rather than by a mere preponderance of the evidence may also limit the number of prosecutions. In one case, a jury concluded in a civil action that a New Jersey lawyer had engaged in unlawful disability discrimination against his secretary when he failed to reinstate her following her disfigurement.¹⁴¹ When prosecutors pursued a subsequent disciplinary action against the lawyer for the same misconduct, however, the lawyer escaped professional discipline because the New Jersey Disciplinary Review Board concluded that there was no clear and convincing evidence of discriminatory intent.¹⁴² Thus, despite the jury verdict in the underlying discrimination case, the lawyer was found not to have violated the relevant New Jersey ethics rule.¹⁴³

134. *See id.*

135. *See* Rhode, *supra* note 5, at 1065 ("Close to fifty years' experience with civil rights legislation reveals almost no final judgments of sex or race discrimination involving law firms.").

136. *See infra* notes 165–67.

137. Levit, *supra* note 24, at 70.

138. *See* Cincinnati Bar Ass'n v. Young, 731 N.E.2d 631, 638 (Ohio 2000) (holding that there need not be a preliminary finding of discrimination in a civil matter before discipline may be imposed).

139. N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2015).

140. *Id.*

141. *See In re* Gourvitz, No. DRB 05-117 (N.J. 2005), <http://njlaw.rutgers.edu/collections/drbd/decisions/05-117.pdf>.

142. *Id.* at 35.

143. *Id.* at 50.

4. *The Absence of a Rule Prohibiting Employment Retaliation*

Another possible explanation for the lack of disciplinary action involving employment discrimination is the fact that in states with rules prohibiting employment discrimination, there are no complementary rules prohibiting employment retaliation. Title VII and the other major anti-discrimination statutes all contain provisions prohibiting employers from retaliating against employees who oppose unlawful discrimination or who participate in proceedings to remedy discrimination.¹⁴⁴ The inclusion of these provisions reflects a recognition of the fact that fear of employer retaliation is one of the primary reasons why employees do not report discrimination.¹⁴⁵ Thus, anti-retaliation provisions are a vital part of any discrimination statute.¹⁴⁶

Importantly, statutory anti-retaliation provisions typically protect not only the victims of discrimination but also those who voluntarily report discrimination or participate in internal or formal proceedings.¹⁴⁷ This is potentially significant, because if discrimination amounts to professional misconduct that raises a substantial question as to a lawyer's fitness to practice as a lawyer, another lawyer who knows of the misconduct has a professional obligation to report it.¹⁴⁸ By doing so, a lawyer may potentially open himself up to retaliation on the part of an employer. Not only is there no rule of professional conduct prohibiting retaliation when a lawyer fulfills this ethical duty, in some states there may also be no legal remedy for the lawyer who is retaliated against.¹⁴⁹ Thus, the threat of retaliation is a potentially strong deterrent to another lawyer's participation in the disciplinary process.

5. *The Inability to Sanction Law Firms*

Another structural limitation on the ability of ethical rules to address employment discrimination is the absence of a rule permitting the imposition of discipline against a law firm. The rules of professional conduct in nearly every jurisdiction only permit authorities to impose discipline on individual lawyers.¹⁵⁰ A lawyer who orders or ratifies another lawyer's misconduct may be subject to discipline, and a law firm partner or supervisory lawyer may be subject to discipline where the lawyer knows of another lawyer's misconduct and fails to take prompt remedial

144. See, e.g., 42 U.S.C. § 2000e-3(a) (2012) (prohibiting retaliation under Title VII).

145. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 279 (2009).

146. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (discussing the importance of Title VII's anti-retaliation provision within its remedial scheme).

147. *Crawford*, 555 U.S. at 279–80.

148. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (1983).

149. See *Jacobson v. Knepper & Moga, P.C.*, 706 N.E.2d 491 (Ill. 1998) (refusing to recognize retaliatory discharge claim of lawyer who insisted that law firm cease unethical filing practices).

150. Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 2–3, 7 (2002)

action.¹⁵¹ But as a rule, law firms are not subject to discipline for their own misconduct, nor are they vicariously subject to discipline for the misconduct of a firm lawyer.

This general rule of individual liability makes sense in the case of solo practitioners. But in the case of law firm discrimination, it makes considerably less sense. There are certainly some discrimination cases—most notably cases involving sexual harassment—in which there is a sole wrongdoer. But, as discussed previously,¹⁵² discrimination on the part of an organization often involves multiple actors and bias embedded within the structure of the organization. Partnership votes, for example, are likely to involve multiple decisionmakers, basing their decisions on subjective criteria. This may result in decisions being made on the basis of implicit biases that are difficult to pinpoint or confine to one decision maker. Policies and cultures may develop within law firms that, if left unchecked, may adversely impact nontraditional lawyers. As an ethical matter, individual partners may have a responsibility to make reasonable efforts to oversee the firm’s internal practices and norms.¹⁵³ But as a practical matter, where a firm’s practices and norms have a discriminatory impact, the problem is most likely a structural one rather than the fault of any one partner.

B. Limitations on the Ability of Ethics Rules to Address Law Firm Discrimination

Even if some or all of the above limitations could be addressed by amending the rules of professional conduct, there are inherent limitations on the ability of ethics rules to address employment discrimination in the legal profession. First is the inherent complexity of modern discrimination law. To put it mildly, employment discrimination law is a confusing, complicated area of law.¹⁵⁴

Examples abound. For two decades, courts and employment lawyers could not even agree on such seemingly simple issues as what the appropriate proof structure was in a case lacking direct evidence of discriminatory intent.¹⁵⁵ In theory, the Supreme Court’s 2003 decision in *Desert Palace, Inc. v. Costa* shed light on this particular issue, but considerable uncertainty regarding the question remains.¹⁵⁶ As another example, Title VII has different causation standards depending upon whether the

151. MODEL RULES OF PROF’L CONDUCT R. 5.1(c).

152. See Sturm, *Lawyers and the Practice of Workplace Equity*, *supra* note 29, at 281.

153. MODEL RULES OF PROF’L CONDUCT R. 5.1.

154. See, e.g., Corbett, *supra* note 129, at 450 (referring to employment discrimination law as “confused and discredited”); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) (noting the “doctrinal, procedural, and theoretical confusion within employment discrimination law” and the field’s “endless questions about frameworks” rather than core issues).

155. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

156. See Corbett, *supra* note 129, at 490 (noting the “uncertainty and confusion” following *Desert Palace*).

plaintiff is pursuing a discrimination theory or a retaliation theory.¹⁵⁷ Title VII's anti-discrimination provision employs a different causation standard than does the ADEA's anti-discrimination provision.¹⁵⁸ And given the divergent standards in these areas, no one is quite sure which causation standard applies to ADA discrimination and retaliation claims.¹⁵⁹ The standards governing sexual harassment are, by their nature, vague.¹⁶⁰ The issue of an employer's vicarious liability for a supervisor's discrimination is far from straightforward, and federal courts are split as to when an employer is vicariously liable for retaliatory harassment of an employee by coworkers.¹⁶¹ Congress' failure to define the language in Title VII addressing disparate impact claims has rendered disparate impact theory a highly confusing and often ignored area.¹⁶² While Congress recently amended the definition of disability under the ADA to allow more individuals to qualify for disability status, Congress failed to clarify when an accommodation is "reasonable" under the statute and when it imposes an "undue burden."¹⁶³ Adding to the confusion is the reality that sometimes state discrimination law does not neatly track federal law, thus creating the potential for an additional level of complexity.¹⁶⁴

If a state chooses to adopt a rule of professional conduct prohibiting employment discrimination and, in the process, incorporates the existing body of discrimination law, it will be incorporating a highly complex and uncertain set of legal standards. Alternatively, states could eschew established discrimination law if they choose to amend the rules of professional conduct to prohibit discrimination. However, asking disciplinary authorities to master not only the complexities of modern discrimination law, but to devise a new and effective enforcement method is asking

157. See *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013) (explaining why Title VII's anti-discrimination causation standard does not apply in retaliation cases).

158. See *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009) (explaining why Title VII's causation standard does not apply in ADEA cases).

159. See *Brooks v. Capistrano Unified Sch. Dist.*, 1 F. Supp. 3d 1029, 1037 (C.D. Cal. 2014) (applying "but-for" causation standard to ADA retaliation claim); *Quillen v. Touchstone Med. Imaging LLC*, 15 F.Supp.3d 774, 780 n.10 (M.D. Tenn. 2014) (noting split among federal courts on the issue); *Siring v. Or. State Bd. of Higher Educ. ex rel. Eastern Oregon University*, 977 F.Supp.2d 1058, 1062 (D. Ore. 2013) (applying a "motivating factor" to ADA discrimination claims); see also Lisa Schlesinger, Note, *The Social Model's Case for Inclusion: "Motivating Factor" and "But For" Standards of Proof Under the Americans with Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities*, 35 CARDOZO L. REV. 2115, 2117-18 (2014) (noting the existence of a circuit split on this issue).

160. See Larsa K. Ramsini, Note, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1962 (2014) (referring to the vague and uncertain standards that exist in the lower courts).

161. See Alex B. Long & Sandra F. Sperino, *Diminishing Retaliation Liability*, 88 N.Y.U. L. REV. ONLINE 7, 7 (2013) (discussing the split on this issue).

162. See Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287, 297 (2013) (discussing the difficulty of interpreting Title VII's disparate impact provisions); Charles L. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 958-64 (2005) (discussing the muddled development of disparate impact theory that has left the theory "a complicated and confusing doctrine").

163. James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 LAW & PSYCHOL. REV. 89, 114 (2012).

164. Long, *supra* note 42, at 473.

quite a bit. Regardless of the approach, if states expect their professional responsibility organizations to engage in significant enforcement, they would need to be willing to develop special units with special expertise and responsibility for addressing employment discrimination.

Another limitation arises simply by virtue of the fact that the respondents in any disciplinary action would be lawyers. Anyone seeking to prove employment discrimination against a law firm—whether a plaintiff in a civil suit or a disciplinary agency seeking to prosecute lawyers within the firm for misconduct—faces significant problems of proof just based on the fact that the defendants are lawyers.¹⁶⁵ Since the defendants are lawyers, they may be able to plausibly assert that the evidence necessary to establish discrimination is subject to the attorney-client privilege.¹⁶⁶ And while it is uncommon in modern litigation for an employer to allow “smoking gun” direct evidence of discriminatory intent to exist, one has to assume that such evidence is even harder to come by in the case of lawyers (who, one would assume, are well trained enough to avoid producing incriminating documentation).¹⁶⁷

But perhaps the most significant limitation on the ability of ethics rules to address employment discrimination involves the structure of law firms. The same law firm norms and practices that may lead to discrimination and exclusion may also make it exceptionally difficult to actually prove that same discrimination. Title VII was enacted at a time when animus and outright exclusion were the primary barriers to equal employment.¹⁶⁸ While animus remains a problem, employment discrimination today typically involves more subtle, less detectable forms of discrimination. Therefore, as Professor Deborah Rhode has observed, there is a “mismatch between legal definitions of discrimination and the social patterns that produce it.”¹⁶⁹ As Rhode notes, “most bias is not a function of demonstrably discriminatory treatment.”¹⁷⁰ Instead, it is “a product of interactions shaped by unconscious assumptions and organizational practices” that is difficult to trace to discriminatory motives.¹⁷¹ In short, significant questions remain as to whether existing employment discrimination statutes are equipped to address the problems of modern workplaces.¹⁷²

165. See Levit, *supra* note 24, at 69 (noting the “particular difficulties” plaintiffs face when suing law firms).

166. *Id.* at 72.

167. *Id.* at 75; Rhode, *supra* note 5, at 1066.

168. See Sturm, *Second-Generation Employment Discrimination: A Structural Approach*, *supra* note 25, at 459–60 (discussing the outright exclusion that initially characterized employment discrimination).

169. Rhode, *supra* note 5, at 1065.

170. *Id.*

171. *Id.*

172. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (“Unconscious bias . . . generates inequalities that our current antidiscrimination law is not well equipped to solve.”).

The result is that those seeking to prove employment discrimination within a law firm may face “insurmountable proof problems.”¹⁷³ Courts frequently require individuals seeking to establish disparate treatment to present “comparator evidence,” i.e., evidence of how the employer treated an employee who was “similarly situated in all relevant respects.”¹⁷⁴ Yet, as Professor Nancy Levit has noted, “most law practice is so individualized that comparator evidence simply does not exist.”¹⁷⁵ Aside from in smaller law firms, discrimination can rarely be traced to one, single bad actor.¹⁷⁶ Instead, promotion decisions typically involve multiple decisionmakers, thus making it more difficult to establish that one individual’s discriminatory attitudes had any effect on the ultimate decision.¹⁷⁷ Moreover, most partnership committees do not base their decisions on a clearly-defined, fixed standard for promotion.¹⁷⁸ Instead, they typically employ more informal, subjective standards. This type of decisionmaking makes it more likely that cognitive biases and unconscious stereotyping will influence the ultimate decision.¹⁷⁹ But it also may make it more difficult for individuals to prove that they were subjected to discrimination.¹⁸⁰

Disciplinary authorities are also likely to confront significant structural obstacles in attempting to rely on statistical evidence to establish discrimination. There is certainly considerable statistical disparity in terms of law firm hiring and promotion numbers.¹⁸¹ Reliance on bottom-line statistical disparity, however, is insufficient to establish a prima facie case of disparate impact under Title VII.¹⁸² Instead, a plaintiff must identify the specific employer practice that causes the statistical disparity.¹⁸³ This presents anyone attempting to establish a disparate impact case against a law firm with some significant problems.

First, most firms are not big enough to allow for meaningful statistical analysis.¹⁸⁴ Second, even if the firm is big enough to permit such analysis, it may be impossible for disciplinary authorities to identify the specific practice that has caused the statistical disparity.¹⁸⁵ As Professor Levit has explained, “lawyers work in varying practice areas and on numerous different cases, with myriad project assignments, and in constantly fluc-

173. Levit, *supra* note 24, at 72.

174. *Id.* at 74.

175. *Id.* at 73.

176. Rhode, *supra* note 5, at 1065.

177. See *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) (involving alleged discrimination by some actors, but not necessarily on the part of the ultimate decisionmaker); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (“[W]here several decisionmakers are involved, proof of racially discriminatory motivation is even more difficult.”).

178. Rhode, *supra* note 5, at 1065.

179. Sturm, *Second-Generation Employment Discrimination: A Structural Approach*, *supra* note 25, at 485.

180. Rhode, *supra* note 5, at 1065.

181. See *supra* notes 4–6 and accompanying text.

182. Levit, *supra* note 24, at 81.

183. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656–58 (1989).

184. Levit, *supra* note 24, at 81–82.

185. *Id.* at 81.

tuating teams.”¹⁸⁶ This may make it virtually impossible to establish that one particular practice caused the disparity. And while it is theoretically possible to identify an employer’s subjective decisionmaking process as the specific practice producing the disparate impact, plaintiffs have generally had little success with such claims.¹⁸⁷ Finally, even if disciplinary authorities could overcome these obstacles, an employer may still defend against a disparate impact claim by demonstrating the challenged practice was job-related and consistent with business necessity.¹⁸⁸ Given the longstanding practice in the legal field of making promotion decisions on the basis of “high billable hour counts, rainmaking talent, ‘analytical abilities,’ or other amorphous partnership-quality measures,” it should be a relatively easy matter for firms to satisfy this defense.¹⁸⁹ As a result of these types of structural obstacles, Professor Levit has observed that “[t]here are extraordinarily few disparate impact cases filed by lawyers against their firms.”¹⁹⁰ Disciplinary authorities proceeding under a systemic disparate treatment theory would face similar statistical problems, as well as the host of problems presented in individual disparate treatment cases.¹⁹¹

C. *Do the Costs Outweigh the Benefits?*

As a result of these kinds of problems, there have been few successful employment discrimination suits by lawyers against law firms. Similarly, there appear to have been almost no successful prosecutions for professional misconduct involving employment discrimination by one lawyer against another. In the few reported decisions in which a disciplinary authority actually charged lawyers with misconduct under these rules, the alleged discriminatory conduct was typically directed at nonlawyers and involved fairly straightforward and blatant instances of discrimination (e.g., unwanted physical contact amounting to sexual harassment) instead of the more subtle forms of discrimination that often take place.¹⁹²

All of this suggests that simply amending the rules of professional conduct to prohibit employment discrimination among lawyers and enforcing the rule the same way other ethics rules are enforced is unlikely to have much impact in terms of addressing employment discrimination

186. *Id.*

187. *See* *Watson v. Ft. Worth Bank & Tr.*, 487 U.S. 977 (1988) (holding that an employer’s subjective practice may amount to a specific employment practice that is actionable under Title VII); Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 455–56 (2012) (reporting results of study finding low number of such claims and lower than average success rate).

188. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071.

189. Levit, *supra* note 24, at 83.

190. *Id.* at 81.

191. *See id.* at 84 (“Systemic disparate treatment cases will encounter many of the same statistical problems as disparate impact suits.”).

192. *See* *Cincinnati Bar Ass’n v. Young*, 731 N.E.2d 631, 640 (Ohio 2000); *People v. Lowery*, 894 P.2d 758, 760 (Colo. 1995) (en banc).

and increasing diversity in the legal profession. The fact that several of the states with such ethics rules have imposed a requirement—or at least expressed a preference—for discrimination charges to first be dealt with through civil litigation perhaps reflects the conclusion that relying upon disciplinary authorities to police discrimination in the same manner they police, for example, mishandling of client funds is an inefficient allocation of scarce prosecutorial resources.

For instance, a comment to New Jersey's rule expressly provides that employment discrimination is not covered by the rule unless it has resulted in an agency or judicial determination of discriminatory conduct.¹⁹³ The rest of the comment explains the New Jersey Supreme Court's thinking regarding this requirement:

The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.¹⁹⁴

In light of all of the limitations to effective enforcement identified in this Article, one might perhaps ask whether it is worth adopting any kind of ethical rule prohibiting employment discrimination. If disciplinary prosecutors are going to be unable to prosecute but a few cases, perhaps it is not worth the added expense of attempted enforcement. Perhaps employment discrimination in the practice of law is better dealt with as a matter of law than as a matter of ethics.

This would be an overly narrow view of the purpose of rules of professional conduct. As Professor Fred Zacharias once noted, “professional codes can properly include provisions that the drafters anticipate will be enforced only rarely; legal ethics regulation typically implements a variety of functions, some of which are well-served by hortatory rules.”¹⁹⁵ While amending the rules to prohibit discrimination might not lead to many prosecutions, it might still produce results that would justify the costs of doing so.

The lawyer disciplinary process serves multiple functions, including the dissemination of the profession's values both within the profession and to the public.¹⁹⁶ Rules of professional conduct might also have what Zacharias refers to as a methodological objective: “influencing lawyer

193. N.J. RULES OF PROF'L CONDUCT R. 8.4 (2015).

194. *Id.*

195. Zacharias, *supra* note 125, at 974.

196. See generally Balla v. Gambro, Inc., 584 N.E.2d 104, 110 (Ill. 1991) (stating that rules of professional conduct “hope to articulate in a concrete fashion certain values and goals”); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 601 (1992) (stating that the rules are an “an expression of the legal profession's duties in light of professional values”); Fred C. Zacharias, *The Purpose of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 698 (2003) (identifying one of the purposes of the disciplinary process as enhancing the image of the legal profession).

behavior by threatening discipline or encouraging introspection.¹⁹⁷ Professional conduct rules that parallel or supplement existing external law may educate lawyers concerning obligations about which they otherwise might not give any thought.¹⁹⁸ Such rules may cause lawyers to reflect upon the problem the ethics rules and substantive law seek to address, thereby raising their consciousness concerning an issue.¹⁹⁹ The ABA's adoption of Model Rule 1.8(j), which prohibits a lawyer from engaging in sexual relations with a client,²⁰⁰ provides an example. Although such conduct might violate other rules of professional conduct as well as a lawyer's fiduciary duty to a client, the ABA adopted Model Rule 1.8(j), in part, to "alert[] lawyers more effectively to the dangers of sexual relationships."²⁰¹ Finally, as Zacharias notes, professional conduct rules may also supplement *inadequate* external law by informing lawyers as to their obligations and perhaps reducing their resistance to complying with the external law on the subject.²⁰²

Amending the rules of professional conduct to more explicitly address bias, including employment discrimination, in the practice of law is consistent with these objectives. A new rule of conduct addressing these issues could be used to encourage legal employers to reevaluate and monitor their firm's practices as part of a comprehensive attempt to eliminate bias and employment discrimination, promote equal access to justice, and increase diversity. While the threat of professional discipline might provide some limited encouragement, the more realistic objective would be for the rule to raise awareness concerning these issues, thereby encouraging voluntary compliance.²⁰³

There are several reasons why the adoption of such a "soft" regulatory approach²⁰⁴ to the problems of bias, discrimination, and underrepresentation is particularly appropriate in this instance. First, existing employment discrimination law is decidedly inadequate when it comes to addressing implicit biases and the structural causes of discrimination. Moreover, it is likely to remain that way for the foreseeable future. A rule of professional conduct could supplement this existing body of law

197. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 227 (1993).

198. *Id.* at 255 n.99.

199. *Id.*

200. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (1983).

201. REPORTER'S EXPLANATION OF CHANGES Rule 1.8(j), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/e2k/10_85rem.authcheckdam.pdf (last visited Jan. 8, 2015).

202. Zacharias, *supra* note 197, at 255.

203. Interestingly, there is also a history of using the law in a similar manner in the employment discrimination field. Professor Susan Carle has argued that the earliest employment discrimination laws at the state level used "regulatory techniques to induce employers to voluntarily scrutinize and revise traditional employment practices to open more employment opportunities for racial minorities." Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 255 (2011). The original supporters of these laws "viewed law as a means of motivating employers to engage in voluntary self-scrutiny and revision of their employment practices to increase minority employment opportunities." *Id.*

204. *Id.* at 251.

to help bring about reform. Much in the same way the rule of professional conduct prohibiting sex with a client may help to educate lawyers regarding their preexisting common law fiduciary duties with respect to clients,²⁰⁵ a rule addressing bias, discrimination, and diversity may help to educate lawyers about the subtle ways in which employment discrimination operates. Relatedly, much in the same way that the rules regarding pro bono legal services and court appointments may serve to help educate lawyers about the problem of access to justice, such a rule could help legal employers better understand the nature of the problem and the need for change. In this sense, the rule could serve an important purpose despite the likelihood that it will be enforced infrequently.

In addition, adopting a specific rule that takes a comprehensive view of the problems could be a means of communicating the legal profession's commitment to the core values of equality of opportunity, equal treatment, access to justice, and diversity.²⁰⁶ The legal system is, of course, based on principles of equality. Discriminatory conduct on the part of lawyers is especially troubling because it displays a lack of respect for these fundamental principles.²⁰⁷ In short, discriminatory conduct on the part of a lawyer raises a serious question regarding that lawyer's fitness as a lawyer. The legal profession's toleration of such conduct—or at least its failure to expressly condemn it—sends a signal to the public and members of the profession about the extent to which the profession has truly internalized these principles.

For example, while there is considerable disagreement whether incivility is prevalent enough within the profession to justify the establishment of rules of professional conduct prohibiting incivility, there should be no dispute that expressions of racial or similar forms of bias or prejudice directed at other lawyers or participants in the legal process are intolerable. There are certainly enough cases involving this type of misconduct to suggest that it is at least something of a problem within the profession.²⁰⁸ But while some rules of professional conduct might indirectly speak to this type of misconduct, there is no express disapproval of such conduct in the ABA Model Rules of Professional Conduct that signals to the public and members of the profession that it is intolerable.

Discriminatory conduct, including employment discrimination, may also have potential consequences in terms of the public's access to justice. The legal profession's commitment to ensuring access to justice and a client's right to counsel of her choice is embodied in numerous rules of professional conduct, including the rules regarding pro bono services,²⁰⁹

205. See Zacharias, *supra* note 197, at 255 n.99.

206. See generally Wald, *supra* note 1, at 1092 (“Arguably, by remaining silent about fostering diversity and combating discrimination in its most significant role—attorney regulation—the organized bar sends an implicit message of ambivalence regarding diversity legitimizing inaction by other legal constituencies.”).

207. See *supra* note 19 and accompanying text.

208. See *supra* notes 79–81 and accompanying text.

209. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

accepting court appointments,²¹⁰ a client's absolute right to discharge her lawyer,²¹¹ and agreements that limit a lawyer's right to practice, including as part of a settlement agreement.²¹² To the extent a client's choice of lawyer or overall ability to receive legal services is impacted by an employer's discriminatory practices or conduct, the client's right to counsel of her choice and the public's interest in access to justice are compromised. To the extent lawyers engage in harassment, bias on the basis of race or other characteristics against clients or others, or the unwillingness to make the reasonable modifications necessary to allow clients with disabilities to receive legal services, they may likewise limit access to justice and impede the proper functioning of the legal process.

In addition, employment discrimination among legal employers has obvious ramifications for the goal of diversity within the profession. Discriminatory employment practices often leads to lawyers exiting the practice of law.²¹³ In turn, the lack of diversity within the profession may have implications for the public's perception of the legal profession. As the ABA's Presidential Diversity Initiative has explained, "Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice."²¹⁴ Partly for this reason, diversity has increasingly come to be seen by the legal profession as a fundamental value of the profession.²¹⁵ A rule specifically addressing employment discrimination and diversity would be a step toward articulating the legal profession's commitment to this value.

At present, the ABA Model Rules of Professional Conduct do little to express the legal profession's commitment to equality and diversity. The clearest indication of this commitment is buried in a comment to Rule 8.4(d)'s prohibition on conduct prejudicial to the administration of justice.²¹⁶ If the legal profession wishes to send a clearer message on the subject, the ABA and states should amend their rules of professional conduct to expressly prohibit employment discrimination.

V. A PROPOSED RULE

If a new rule designed to cover employment discrimination is in order, what should it look like? The rules that currently exist in some jurisdictions might provide some possible models. After considering possible

210. *See id.* R. 6.2.

211. *See id.* R. 1.16(c); *id.* cmt. 4.

212. *See id.* R. 5.6(b); *id.* cmt. 1.

213. *See Levit, supra* note 24, at 68.

214. AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (2010).

215. Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153, 182 (2013).

216. *See supra* note 71 and accompanying text. It bears mentioning that the impact of this comment is undermined somewhat by the fact that the comment goes on to explain that the fact that a judge has found a lawyer to have used his peremptory strikes in a discriminatory manner is not a basis for discipline. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3.

models, this Part of the Article proposes a new Model Rule of Professional Conduct that speaks to diversity and discrimination.

A. The Need for a More Specific Rule

As discussed, a number of states have rules of professional conduct that simply prohibit a lawyer from engaging in bias in a lawyer's professional capacity.²¹⁷ Such a rule has at least two disadvantages. First, it fails to speak directly to the subject of employment discrimination. Second, it is so broadly worded that it potentially covers a range of conduct, including statements made by a lawyer in a bar journal article or while serving as a legislator, which would be likely to arouse the opposition of members of the bar.²¹⁸

As discussed, there are also a number of states that have rules prohibiting harassment²¹⁹ that might potentially serve as a model for a new rule. These rules speak more directly to the problem of employment discrimination. They are limited only to harassment, however, and do not address the range of other discriminatory practices lawyers have engaged in, including other forms of employment discrimination.

The rules that exist in some states that specifically prohibit employment discrimination²²⁰ or discrimination in violation of law²²¹ hold more promise. Even these rules, however, are somewhat limited. First, while they prohibit employment discrimination, they provide little other guidance to lawyers. They do not address the structural nature of much of employment discrimination, nor do they provide law firm partners with much guidance as to what steps they can take to develop a structure that promotes equality of opportunity.

Second, the rules are underinclusive to the extent that they fail address the full range of discriminatory conduct that stands in conflict with the fundamental values of the legal profession. Employment discrimination is certainly an issue in the legal profession. But other forms of discrimination outside of the employment context may also undermine the legal profession's commitment to equality and access to justice. For example, there are numerous cases involving lawyers who engaged in improper sexual conduct toward clients.²²² This has included such behavior

217. See *supra* notes 75–85 and accompanying text.

218. When the Tennessee Board of Professional Responsibility proposed a rule that would have prohibited bias in a lawyer's professional capacity, the Tennessee Bar Association opposed the amendment and raised concerns that the proposed rule would cover statements made in the state legislature, statements made in CLEs, statements in advertisements for legal services, and statements made in professional articles, books, or opinion columns. Public Comments to Proposed Amendment, available at http://www.tncourts.gov/sites/default/files/comments_-_proposed_amendment_to_supreme_court_rule_8_section_8_4_5.pdf.

219. See *supra* notes 86–93 and accompanying text.

220. See *supra* notes 101–07 and accompanying text.

221. See *supra* notes 94–100 and accompanying text.

222. See, e.g., *McDaniel v. Gile*, 230 Cal. App. 3d 363, 373 (Cal. Ct. App. 1991); *Brett v. Berkowitz*, 706 A.2d 509, 513 (Del. 1998). See generally Alex B. Long, *Lawyers Intentionally Inflicting Emotional Distress*, 42 SETON HALL L. REV. 55, 81–84 (2012) (discussing similar cases).

as threatening to withdraw from representation unless a client submitted to the lawyer's sexual advances,²²³ sending a series of sexualized communications to a client,²²⁴ and manipulating a client into posing nude under the pretense that it was necessary to advance the client's personal injury claim.²²⁵ This is conduct that is currently regulated in most states, if at all, by tort law and disciplinary rules that were not designed to address such misconduct and that provide for an uneasy fit.²²⁶ Similarly, most rules of professional conduct do not specifically address incivility on the basis of race or other factors. For example, one lawyer's discriminatory and abusive comments toward another lawyer in the course of a deposition would not be covered under a rule prohibiting employment discrimination or discrimination in violation of law. Instead, it would be dealt with, if at all, by other somewhat ill-fitting rules of conduct or local civility codes.²²⁷ These are situations, however, in which the conduct in question undermines core values of the legal profession. At present, the legal profession deals with them in only an indirect manner.

B. *The United Kingdom Approach*

If a state chooses to amend its rule to include an express prohibition on discrimination, it should do so in a manner that speaks clearly to the range of discriminatory conduct that undermines the fundamental values of the legal profession. The United Kingdom might provide a possible model. In an effort to address the underrepresentation of women and minorities in the legal profession in England and Wales, the Legal Services Board, the independent body responsible for overseeing the legal profession in those countries,²²⁸ released a report containing recommendations for increasing diversity within the profession.²²⁹ The report identified numerous causes of underrepresentation, including inflexible work policies, informal work practices and policies that work to the disad-

223. *McDaniel*, 230 Cal. App. 3d at 370.

224. See *In re Dudley*, 2013-OLR-5 (Wis. 2013), <http://www.wicourts.gov/services/public/lawyerreg/statuspublic/dudley.pdf>.

225. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Steffes, 588 N.W.2d 121, 122–25 (Iowa 1999).

226. Model Rule 1.8(j), which prohibits a lawyer from engaging in sexual relations with a client, would probably not address the case of the lawyer who manipulates a client into posing nude since such conduct does not seem to qualify as “sexual relations.” Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change . . .*, 70 TENN. L. REV. 27, 55 (2002).

227. See MODEL RULES OF PROF'L CONDUCT R. 3.5(d) (1983) (prohibiting conduct intended to disrupt a tribunal); *id.* R. 4.4(a) (prohibiting a lawyer from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person”); *id.* R. 8.4(d) (prohibiting conduct prejudicial to the administration of justice); Katherine Sylvester, *I'm Rubber, You're Sued: Should Uncivil Lawyers Receive Ethical Sanctions?*, 26 GEO. J. LEGAL ETHICS 1015, 1015–16 (2013) (discussing the relation between civility codes and legal ethics).

228. LEGAL SERVICES BOARD, <http://www.legalservicesboard.org.uk/> (last visited Jan. 8, 2015).

229. Hilary Sommerlad et al., *Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices*, LEGAL SERVICES BOARD, available at http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lb_diversity_in_the_legal_profession_final_rev.pdf (last visited Oct. 8, 2015).

vantage of women and racial minorities, and stereotyping.²³⁰ The report made various recommendations to increase diversity within the profession, including the suggestion (eventually adopted) that law firms collect data on diversity within their firms.²³¹

The legal profession has adopted other rules-based measures to increase diversity and to address bias and prejudice within the profession to approach the issue of diversity. The U.K. Legal Services Act of 2007 sets forth eight “regulatory objectives,” one of which is “encouraging an independent, strong, *diverse* and effective legal profession.”²³² The Solicitors Regulatory Authority (“SRA”), the “front-line regulator” for solicitors in England and Wales, and the Bar Standards Board (“BSB”), the front-line regulator for barristers in England and Wales,²³³ have both adopted rules of professional conduct addressing diversity and discrimination. In addition to articulating clear standards regarding diversity and discrimination, the rules take a structural approach to dealing with the problems.

For example, Chapter 2 of the SRA’s Code of Conduct does several noteworthy things. First, it makes a clear statement as to the importance of “encouraging equality of opportunity and respect for diversity, and preventing unlawful discrimination”²³⁴ Second, it takes a holistic approach to these values that is not limited to employment discrimination. Instead, the duty applies to a lawyer’s relationship with his client and others, including other lawyers.²³⁵ Thus, the duty extends to the employee recruitment process, the provision of legal services to clients, and the treatment of third parties in connection with client matters.²³⁶ Third, the Code establishes a series of mandatory outcomes with which lawyers must comply. These include:

230. *Id.* at 6–7.

231. LEGAL SERVICES BOARD, INCREASING DIVERSITY AND SOCIAL MOBILITY IN THE LEGAL WORKFORCE: TRANSPARENCY AND EVIDENCE 2–3 (2011), available at http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/decision_document_diversity_and_social_mobility_final.pdf.

232. Legal Services Act c. 29 § 1, 2007 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2007/29/section/1>. The full list of regulatory objectives is as follows:

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

Id. For a broader discussion of the LSA, see Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195 (2010).

233. Laurel S. Terry, *Transnational Legal Practice*, 47 INT’L LAW. 485, 485 (2013).

234. SRA CODE OF CONDUCT ch. 2 (2011), available at <http://www.sra.org.uk/solicitors/handbook/code/content.page>.

235. *Id.*

236. *Id.*

- (1) Avoiding unlawful discrimination and avoiding victimization or harassment of others;
- (2) providing services to clients in a way that respects diversity;
- (3) making “reasonable adjustments to ensure that disabled clients, employees or managers are not placed at a substantial disadvantage compared to those who are not disabled,” and that the costs of these adjustments are not passed on to these disabled clients, employees or managers;
- (4) ensuring that the firm’s approach to recruitment and employment encourages equality of opportunity and respect for diversity; and
- (5) dealing with complaints of discrimination “promptly, fairly, openly, and effectively.”²³⁷

Importantly, Chapter 2 emphasizes the need for these values to be “embedded” within a law firm and for firm partners to adopt policies to promote these values.²³⁸ Chapter 2 lists several actions that might indicate that a law firm is in compliance with its obligations under this chapter. These include having a written equality and diversity policy that, among other things, details how the firm “will ensure equality in relation to the treatment of employees, managers, clients and third parties instructed in connection with client matters” and how it will deal with complaints of discrimination.²³⁹ Also indicative of a firm’s compliance with its obligations would be the fact that the firm provides employees and managers with training on the subjects of equality and diversity and that the firm reviews and updates its internal policies regarding these issues.²⁴⁰ Thus, Chapter 2 recognizes that bias and discrimination may be structural problems that can only be dealt with adequately by internalizing these values and developing effective policies and supervisory methods to prevent bias and discrimination from occurring.

The BSB has adopted its own set of Equality and Diversity Rules as part of the Code of Conduct contained in its Handbook.²⁴¹ Like the solicitors’ rules, the BSB’s Equality and Diversity Rules take a structural approach to the issues of diversity and discrimination. Barristers’ chambers are required to have in force “a written statement of policy on equality and diversity” and “a written plan implementing that policy.”²⁴² They must also have an Equality and Diversity Officer, training in fair recruitment and selection processes, recruitment and selection processes that use “objective and fair criteria,” fair distribution of work opportuni-

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. BAR STANDARDS BOARD HANDBOOK D1.2 (2015), available at https://www.barstandardsboard.org.uk/media/1663630/bsb_handbook_sept_2015.pdf.

242. *Id.*

ties, an anti-harassment policy that sets out a procedure for dealing with complaints of harassment, as well as other measures, including “a policy aimed at supporting disabled clients, its workforce and others including temporary visitors.”²⁴³ The Rules also require that an office engage in monitoring and regular review of its policy in order to ensure that it complies with the Rules.²⁴⁴

C. *A Proposed Rule*

To address the concerns raised in this Article, the ABA and state supreme courts should adopt a rule along the lines of the following:

Rule 9.1: Diversity and Equality

- (a) Lawyers should aspire to further the principles of elimination of bias, equality of opportunity, equal access to the courts and its institutions, and diversity.
- (b) It is professional misconduct for a lawyer, in the lawyer’s professional capacity:
 - (1) To engage in employment discrimination prohibited by federal or state law;
 - (2) To engage in harassment or to knowingly manifest, by words or conduct, bias or prejudice toward clients, lawyers, judges, or others on the basis of race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status;
 - (3) To fail to make reasonable modifications in policies, practices, or procedures as necessary to enable clients with disabilities to receive legal services unless doing so would fundamentally alter the nature of the services provided, or to fail to take such steps as may be necessary to ensure that clients with disabilities are not denied services because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the legal services being offered or would result in an undue burden.
- (c) It is professional misconduct for a lawyer to retaliate against any individual because the individual has, in good faith, opposed any practice made professional misconduct by this Rule, or because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing concerning any practice made professional misconduct under this Rule.
- (d) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable mana-

243. *Id.*

244. *Id.*

gerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that no individual is subjected to conduct in violation of this rule.

Several features of the proposed rule bear explanation.

1. *Furthering the Principles of Equality of Opportunity, Equal Access to the Courts and Its Institutions, and Diversity*

Proposed Rule 9.1(a) articulates the legal profession's commitment to equality of opportunity, equal access to the courts and its institutions, and diversity. Much like the Model Rule regarding the provision of pro bono services, the proposed rule establishes an aspirational goal on the part of lawyers.²⁴⁵ Imposing a mandatory duty to further the principles of equality of opportunity, equal access to the courts and its institutions, and diversity would invite a host of unresolvable interpretation issues that would render the rule unenforceable. Thus, like a lawyer's obligations regarding pro bono services, Rule 9.1(a) is aspirational in nature.

Comments to the rule could clarify the meaning and extent of the rule. For example, borrowing from the ABA's Presidential Diversity Initiatives, a comment could explain the connection between diversity and respect for the rule of law.²⁴⁶ The same comment could also explain why other principles, such as promoting equal access to the courts and its institutions, are core values of the legal profession.

A comment could also identify ways in which lawyers may comply with the rule. This could include attending continuing legal education ("CLE") courses on such topics as how to identify ostensibly neutral employment practices that have a disparate impact on women and minorities; education concerning implicit bias as it relates to hiring practices and the practice of law more generally; how to address negative attitudes or comments on the part of other lawyers or judges; what a lawyer's legal and ethical obligations are with respect to clients with disabilities and what the legal obligations of public entities are with respect to making courtrooms and court proceedings accessible to people with disabilities; and measures law firms can take to increase diversity in the workplace.²⁴⁷

245. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

246. See *supra* note 214 and accompanying text.

247. For example, the State Bar of California requires lawyers to have at least one hour of CLE credit devoted to the elimination of bias in the legal profession. Some of the examples included above are courses that qualify for credit under the rule. The State Bar of California, *Qualifying Activities*, CAL. BAR <http://mcle.calbar.ca.gov/Providers/EducationApproval/QualifyingActivities.aspx> (last visited Jan. 8, 2015). Examples of approved courses include "*How to Address Negative Attitudes or Comments of a Judge Toward Minority Attorneys; Sexism in the Field of Criminal Law*, and *Bias Against Women in Law*." Press Release, State Bar of California, MCLE Provider Press (2009), available at http://www.calbar.ca.gov/Portals/0/documents/certification/MCLE_Provider-Press_Spring09.pdf.

2. *Engaging in Employment Discrimination*

To convey a clear message about the profession's core values, any rule of professional conduct addressing diversity and equality should speak specifically to employment discrimination. Moreover, by linking the rule to established federal and state law, rulemakers can eliminate at least some potential interpretive issues and simplify the disciplinary process. The prohibition on employment discrimination, however, should specify that the rule is limited to violations of federal and applicable state law rather than listing a series of protected characteristics as some existing rules of professional conduct do. In theory, positive law reflects shared values. A rule of professional conduct that references existing federal or state law would reflect those values.²⁴⁸ Prohibiting discrimination on the basis of traits that are not covered under existing law invites controversy and confusion in implementation.

To further address the problems of complexity and inadequate resources, a comment should clarify that disciplinary authorities should ordinarily defer or abate disciplinary proceedings while a civil case or administrative proceeding is still pending that involves the same facts. Abatement of disciplinary proceedings is already a common practice in many jurisdictions and is a means of allowing other proceedings to help develop a factual record, thereby conserving the resources of disciplinary authorities.²⁴⁹ For example, a comment to the District of Columbia's rule of professional conduct regarding employment discrimination notes the expertise of agencies such as the EEOC on the subject of employment discrimination, and another comment notes that disciplinary authorities may defer or abate disciplinary proceedings until the resolution of another agency or civil proceeding.²⁵⁰ This approach represents an improvement over the requirement in some states that there must first be a judicial finding that discrimination has occurred before disciplinary proceedings can commence.²⁵¹ This approach prevents disciplinary authorities from acting where an otherwise potentially meritorious civil case is dismissed on procedural grounds or where a plaintiff settles prior to trial. Because so few cases actually proceed to trial and result in a finding of liability, some instances of discrimination may go unaddressed under this approach. Thus, a finding of liability should not be a condition precedent to professional discipline. At the same time, it represents a means of con-

248. Because lawyers are licensed on a statewide basis, the rule should not include local law. A contrary approach would invite confusion and subject lawyers to differing standards. *Chapman v. Bearfield*, 207 S.W.3d 736 (Tenn. 2006).

249. Vincent R. Johnson, Essay, *On the Abuse and Limits of Lawyer Discipline*, 44 CONN. L. REV. 53, 57 (2012).

250. D.C. RULES OF PROF'L CONDUCT R. 9.1 cmt. 3 (2015) ("If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings.").

251. See *supra* notes 106–108 and accompanying text.

serving disciplinary resources while allowing for full development of the factual record and legal arguments.

3. *Engaging in Harassment and Manifesting Bias and Prejudice*

Proposed Rule 9.1(b)(2) is part of the attempt to take a comprehensive approach to the problem of bias in the legal profession. Specifically, it represents an attempt to address the problem of bias and discrimination outside the confines of the employment relationship. As such, it is designed to cover misconduct that is covered only indirectly by existing rules, such as one lawyer's discriminatory statements or conduct to another lawyer or a third party in the course of representing a client as well as a lawyer's harassing sexual behavior toward a client.²⁵²

Importantly, this part of the rule (along with Rule 9.1(b)(1)) is limited to conduct occurring in the lawyer's professional capacity. Because some misconduct may occur outside the course of representing a client—such as the case where a lawyer sexually harasses a prospective client or a lawyer harasses a former client on the basis of a race²⁵³—a broader rule is needed. A comment, however, should be included to limit the reach of the phrase “in the lawyer's professional capacity” to those and similar situations. Thus, the lawyer who engages in bias or prejudice while serving as an elected representative in the state or legislature or who makes racist statements on a legal blog or in a book or article should not be subject to discipline under the rule. Consistent with longstanding norms of the legal profession, the comment could also clarify that a lawyer's decisions with respect to whether to represent a client are not within the scope of the rule.

4. *Failing to Make Reasonable Modifications*

Rule 9.1(b)(3) addresses the special nature of disability discrimination, including the fact that the failure to provide legal services to a disabled client in a readily accessible manner effectively deprives that client of full access to justice. In this sense, the rule parallels the ADA's provisions with respect to the provision of services by places of public accommodation.²⁵⁴ The proposed rule is also part of the attempt to address equality issues in a comprehensive manner. Comments to the rule should clarify that the rule covers the provision of auxiliary aids or interpreters as necessary to effectively communicate with a client. Moreover, the comments should clarify that, consistent with the ADA, the costs of making any necessary modifications or acquiring any necessary aids or interpreters may not be passed along to a client.²⁵⁵

252. See *supra* notes 77–81 and accompanying text.

253. See *supra* notes 89–92 and accompanying text.

254. 42 U.S.C. § 12182(b)(2)(A)(iii) (2012).

255. 28 C.F.R. § 36.301(c) (2014); *supra* note 237 and accompanying text. In another article, I proposed a comment to Rule 1.4, the rule regarding communication with a client, to clarify the scope

5. *Retaliation*

Proposed Rule 9.1(c) is designed to address the potential for retaliation. The proposed rule largely tracks the language of Title VII's anti-retaliation provision.²⁵⁶ In order to reduce unnecessary complexity, a comment could clarify that, to the extent feasible, the rule should be interpreted in a manner consistent with federal law. Thus, for example, it would be professional misconduct for a lawyer to take any action in retaliation against an individual for engaging in protected activity under the proposed rule that might dissuade a reasonable person from opposing professional misconduct under the rule or making or supporting a charge of professional misconduct under the rule.²⁵⁷

6. *Special Responsibilities of Law Firm Management*

Finally, proposed Rule 9.1(d) attempts to address the structural causes of the problems of bias, inequality, and underrepresentation. Much like current Model Rule 5.1, the proposed rule would impose upon law firm partners and those with similar managerial authority an affirmative obligation to develop and monitor law firm policies and procedures.²⁵⁸ But the proposed rule would be broader in that it would speak directly to policies and procedures designed to address employment discrimination and the other forms of misconduct identified in the rule. Drawing upon the U.K. experience,²⁵⁹ a comment to the rule could identify several indicators of compliance with rule. These might include the fact that the lawyer's firm has a written equality and diversity policy, that the firm provides employees and managers with training on the subjects of equality and diversity, that the firm provides training in fair recruitment and selection practices, that the firm has an anti-harassment and discrimination policy with detailed procedures for dealing with complaints, that the firm has a policy aimed at supporting disabled clients, employees, and others (including visitors to the firm), and that the firm

of a lawyer's duty with respect to communicating with and providing competent representation to a client with disability. Long, *Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism*, *supra* note 6, at 1803. That same comment could be added to proposed Rule 9.1: "Comment: A lawyer who undertakes to represent a client with whom effective direct lawyer-client communication can only be maintained through an interpreter, auxiliary aids and services, or alternative forms of communication must consider the most appropriate means of communication necessary for effective representation and, where necessary, secure and pay for the services of a qualified interpreter or provision of auxiliary aids and services." *Id.*

256. Cf. 42 U.S.C. § 2000e-3(a) (2012). I have previously argued in favor of a separate rule of professional conduct that would prohibit retaliation against a lawyer who complies with his or her ethical duty to report professional misconduct under Rule 8.3(a). See Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 814-16 (2009).

257. Cf. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) ("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'").

258. Cf. MODEL RULES OF PROF'L CONDUCT R 5.1 (1983).

259. See *supra* Part V.B.

reviews and updates its internal policies regarding these issues.²⁶⁰ While the existence of such measures within a firm would be indicators of compliance with a lawyer's obligation under the rule, the rule still imposes an individual duty upon law firm partners.²⁶¹ Thus, a firm partner who actively engages in discrimination or who otherwise fails to make reasonable efforts as required under the proposed rule would still be subject to discipline despite the existence of firm-wide policies and procedures addressing bias and diversity.

VI. CONCLUSION

The lack of diversity within the legal profession remains a serious problem. But existing employment discrimination statutes are poorly equipped to address the structural causes of workplace discrimination that often occur. It is therefore unrealistic to expect rules of professional conduct based on these laws to root out discrimination and increase diversity in the legal profession in the traditional sense.

But that is not a reason to reject the adoption of ethics rules that speak to the problem of employment discrimination and, more generally, the problems of bias, access to justice, and underrepresentation in the legal system. By adopting such rules, the legal profession could take a soft regulatory approach to these problems in an attempt to educate and motivate lawyers and law firms with regard to the problems. This type of gentle regulatory nudge might potentially yield more dividends than reliance on legal rules alone.

260. See *supra* notes 238–44 and accompanying text.

261. Ideally, the rule would impose a duty upon the firm itself. However, since nearly every state has rejected the idea of law firm discipline, the proposed rule reflects a concession to reality.

